IN THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

COMPLETE TITLE OF CASE

TERRY L. HUTTON,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

DOCKET NUMBER WD72236

MISSOURI COURT OF APPEALS WESTERN DISTRICT

DATE: July 26, 2011

APPEAL FROM

The Circuit Court of Jackson County, Missouri The Honorable Jay A. Daugherty, Judge

JUDGES

Division IV: Hardwick, C.J., and Mitchell and Martin, JJ.

CONCURRING.

ATTORNEYS

Susan E. Summers, Assistant Appellate Defender Kansas City, MO

Attorney for Appellant,

Chris Koster, Attorney General Shaun J. Mackelprang, Assistant Attorney General Jefferson City, MO

Attorneys for Respondent.



MISSOURI APPELLATE COURT OPINION SUMMARY MISSOURI COURT OF APPEALS, WESTERN DISTRICT

TERRY L. HUTTON,)
	Appellant,)
v.) OPINION FILED:
) July 26, 2011
STATE OF MISSOURI,)
)
	Respondent.)

WD72236 Jackson County

Before Division IV Judges: Lisa White Hardwick, Chief Judge, Presiding, and Karen King Mitchell and Cynthia L. Martin, Judges

This is a Rule 29.15 case. The issues are whether the defendant was abandoned by his post-conviction counsel and whether the Rule 29.15 motion stated facts sufficient to justify a hearing. We hold that the abandonment issue is not properly before us in that the defendant did not raise it below. We hold further that the Rule 29.15 motion did not state facts sufficient to warrant a hearing in that it did not allege facts that, if proved, would establish prejudice. Therefore, we affirm.

AFFIRMED.

DIVISION IV HOLDS:

Appellant Terry Hutton did not argue below that his post-conviction attorneys abandoned him, but he asks us to review the record on this point for plain error. However, plain error review does not apply in post-conviction cases. *Hoskins v. State*, 329 S.W.3d 695, 699 (Mo. banc 2010) (holding that plain error review does not apply on appeal in Rule 24.035 cases). The proper venue for Hutton's abandonment claim is in a motion to reopen the Rule 29.15 case. *See State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 217-18 (Mo. banc 2001).

Hutton also argues that the trial court clearly erred in denying his Rule 29.15 motion without a hearing in that he alleged facts that, if proved, would warrant a finding of ineffective assistance of his trial counsel. To show the prejudice sufficient to establish an ineffective

assistance claim, the movant must prove that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Taylor v. State*, 126 S.W.3d 755, 759 (Mo. banc 2004). Here, Hutton's Rule 29.15 motion does not allege facts that, if proved, would establish prejudice.

Conclusion

Whether post-conviction counsel abandoned Hutton is an issue that was not raised below, and therefore we do not address it on appeal. The proper venue for such a claim is in a motion to reopen the Rule 29.15 case. The motion court did not clearly err in denying the Rule 29.15 motion without a hearing in that the motion did not allege facts that, if proved, would establish prejudice. We therefore affirm the motion court's judgment.

OPINION BY: Karen King Mitchell, Judge

July 26, 2011

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THIS SUMMARY IS **UNOFFICIAL** AND SHOULD NOT BE QUOTED OR CITED.